

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1310B

To be argued by
HARRY C. BATCHELDER,

P/5

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1310

UNITED STATES OF AMERICA,

Appellee,

—
JESUS RAMOS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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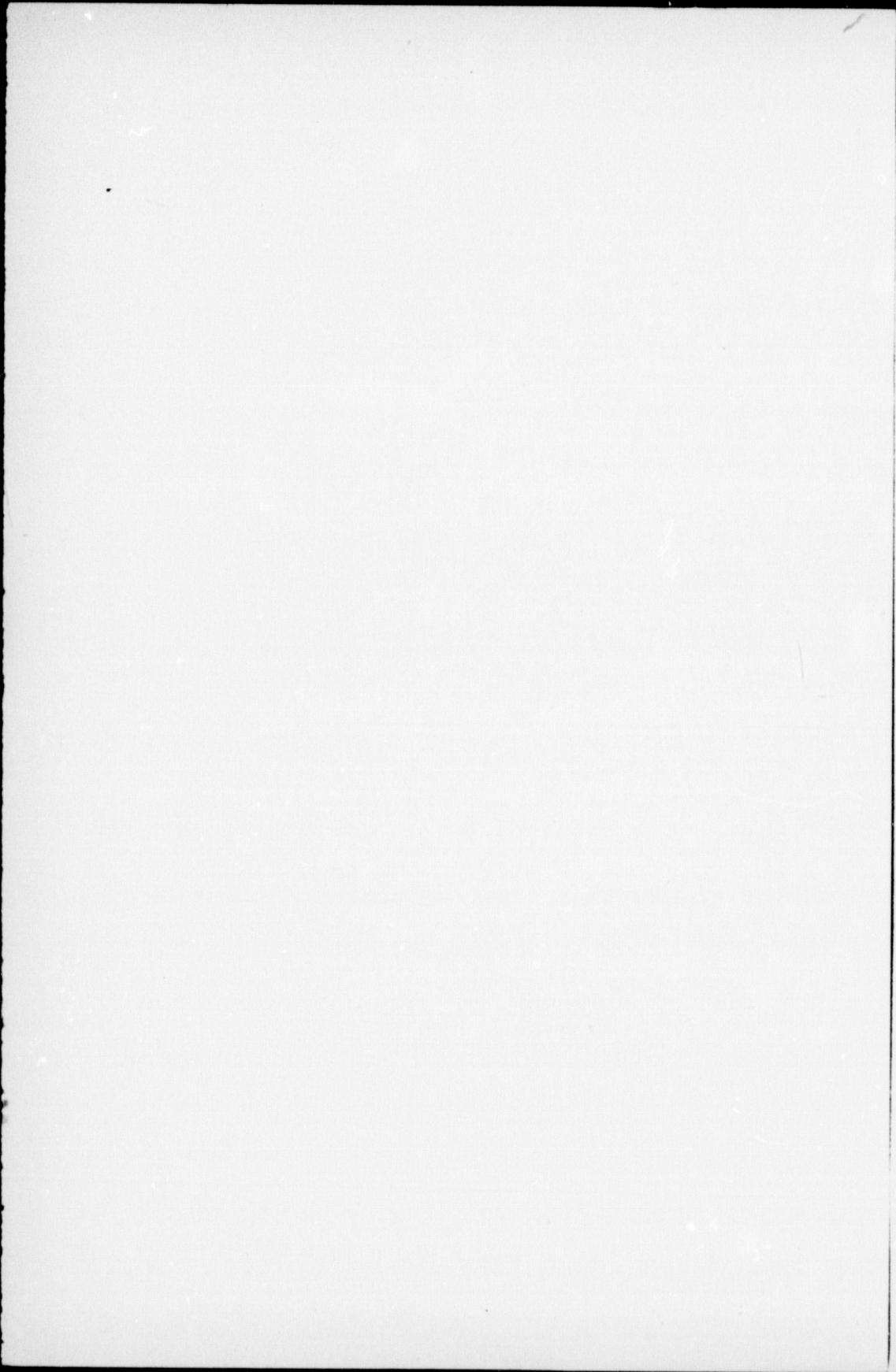


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FOR THE SECOND CIRCUIT

Docket No. 74-1310

UNITED STATES OF AMERICA,

Appellee,

—v.—

JESUS RAMOS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jesus Ramos appeals from a judgment of conviction entered on February 28, 1974, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Marvin E. Frankel, United States District Judge, sitting without a jury.

Indictment 73 Cr. 68, filed January 19, 1973, charged Ramos in three counts with failure to register for Selective Service, failure to report for an Armed Forces physical examination, and failure to report for induction into the Armed Forces. Title 50 Appendix, United States Code, Section 462(a).

Trial commenced on December 6, 1973, and concluded on January 16, 1974, Ramos was found guilty on all three counts. On February 28, 1974 Judge Frankel sentenced Ramos to imprisonment for one year, with execution suspended, and probation for one year.

Statement of Facts

The Government's Case

Jesus Ramos reached the age of 18 on April 24, 1968, but did not register with the Selective Service until January 7, 1972, nearly four years later (GX 1; Tr. 19, 42).* When he finally registered Ramos was asked to execute and sign a statement setting forth the reason for his lateness; he wrote: "I was unaware of the legal facts pertaining to the situation and I was studying (Tr. 21, GX 2B). Ramos also executed a classification questionnaire in which he listed Angel Rivera, 271 E. 7th Street, New York, New York 10009, as a person who would always know his whereabouts. Ramos gave as his own address Apartment 11F, 170 Avenue D, New York, New York 10009.** On January 10, 1972 a Selective Service Registration card was sent to that address and was not returned (Tr. 18-19).

On February 22, 1972, Ramos' late registration was excused by the Local Board, and he was classified 1-A (available for Military Service).*** Notice of the Board's action was mailed to Ramos and never returned (Tr. 22). On April 14, 1972, a notice was mailed to Ramos ordering him to report for an Armed Forces Physical examination on May 1, 1972 (Tr. 23). The notice was never returned, but Ramos did not report (Tr. 24, GX 2D).

On May 4, 1972, tracer letters were sent to Ramos' wife, from whom he lived apart, and Angel Rivera. Both letters were returned marked "addressee unknown" and

* References preceded by "Tr." are to pages of the trial transcripts of December 6, 1973 and January 16, 1974; "GX" denotes Government exhibits.

** It was stipulated at trial that Ramos continuously resided at that address during the course of the events leading to the indictment.

*** Since Ramos' lottery number, (70)002, had long since been reached, Ramos was liable for immediate induction (Tr. 21, 23-24, 47-49).

"unclaimed" (Tr. 25-27, GX 2E). On May 26, 1972, an order was sent to Ramos directing him to report for induction on June 28, 1972, but he failed to report (GX 2F, 2G, Tr. 29-30, 58). However, on July 5, 1972 Ramos appeared at the Local Board. Asked to explain his failure to report on prior occasions and to furnish his address, Ramos signed the following statement: "I presently live at 170 Avenue D, Apt. 11F, New York, New York 10009. I didn't receive an order to report for a physical, and came in today to find out why I was not ordered" (GX 2H, Tr. 30-31, 59-60). Ramos also completed a current information questionnaire in which he stated he was a cab driver with the B & B Cab Co., 1724 Jerome Avenue, Bronx, New York (GX 2I, Tr. 31-32). The clerk of the Local Board handed Ramos a letter which ordered him to report on July 6, 1972 to the Armed Forces Examining Station at 201 Varick Street (GX 2J, Tr. 32-33, 35, 59). He failed to report for induction on July 6, 1972 (GX 2K, Tr. 35, 65). Additional tracer letters were then sent to addresses given on the current information questionnaire executed by Ramos on July 5, 1972. The letter to the B & B Cab Company was returned marked "No such number" and the letter to Angel Rivera was neither returned nor answered (GX 2L, Tr. 36).

Special Agent Charles Bartles of the F.B.I. testified that he left notes for Ramos regarding his Selective Service delinquency under his door on October 4, 24 and November 16, 1972, and mailed him a letter on November 21, 1972 (Tr. 80, 83, 94, GX 3).* When interviewed by Bartles on January 22, 1973, Ramos denied having received any mail from the F.B.I., claiming that he had been having trouble with his mailbox. Ramos indicated he was willing to submit to induction on his next day off, which was January 29, 1973 (Tr. 74-75, 84). Ramos failed to report for induction on January 29, 1973 (Tr. 87-88).

* No reply was received to either the notes or the letter, which was not, however, returned.

On February 21, 1973, Special Agent Bartles arrested Ramos and, after warning him of his rights, asked him why he had not reported as ordered on January 29, 1973. Ramos replied that subsequent to the interview he had read that there were no more inductions so he decided not to go (Tr. 76, 91). Ramos also stated he had no problems with the draft because his anticipated appointment with the Department of Correction would preclude his induction.* Asked why he did not report on July 6, 1972, after receiving the induction order of July 5 at the Local Board, Ramos stated he woke up the next day and felt sick so he didn't report (Tr. 77).

During the course of his investigation Agent Bartles checked the addresses that Ramos had furnished for Angel Rivera, whom Ramos had listed on two occasions as a person who would know his whereabouts. Bartles learned that the two addresses variously furnished by Ramos for Rivera were the Christian Missionary Church and a tenement. Inquiry failed to reveal anyone who knew Angel Rivera (Tr. 77-78, 82). Investigations regarding the B & B Cab Company of 1724 Jerome Avenue revealed no such company or address (Tr. 78).

Godfredo Lebron, the former Selective Service liaison officer for the Armed Forces Examining and Entrance Station at 201 Varick Street, New York, made a thorough check of the records of that office but failed to find any record of Ramos' appearance at the Station (Tr. 106-7).

James Nall, the Assistant Manager of the Jacob Reiss Housing Authority, which encompassed Apartment 11F at 170 Avenue D, testified that his records indicated no repairs

* Loretta Foley, the supervisor of the recruitment division for the New York City Department of Correction testified that a letter had been sent to Ramos as early as November 9, 1971 informing him that he had not been designated for appointment by the Department of Correction (GX 4; Tr. 76, 100).

to mailboxes and no complaints as to mailbox damage since Ramos had been in the apartment (Tr. 111-112, 116). Nall further testified that it is not feasible to open a mailbox without a key or forced entry (Tr. 117).

Jaime Velazquez, a letter carrier who had been delivering mail to apartment 11F at 170 Avenue D since 1971, testified that in three years since then no complaints had ever been made concerning the mail box at that location (Tr. 118-119).

The Defense Case

Ramos testified he was twenty-three years old, had resided at 170 Avenue D for the past four years, and was presently employed by the Columbia Operating Company (Tr. 127-8). Prior to this he worked as a cab driver for the B.B. Operating Company in the Bronx but could not recall its address (Tr. 129). He first became aware of his duty to register for Selective Service during a police training program to become a correction officer which he attended from 1970 to 1971 (Tr. 130-131).

Ramos admitted to hearing about the draft while in high school but claimed that none of his friends or teachers told him he had to register and that he believed if he was in an educational institution he would be exempt (Tr. 132-133). After graduating from high school he became a matriculated college student for two terms and then went into the police cadet program (Tr. 134-135).* Ramos produced a police cadet program identification card in the name of "Jay Ramos" which indicated a participation in that program from June 29, 1970 to December 31, 1970 (Tr. 142-143). It was during discussions of the New York State

* At this point Ramos' counsel indicated to the Court that there was no record of Ramos ever having participated in such a program and requested a mistrial (Tr. 136-137). Judge Frankel denied the motion on the basis that simply telling a lie is not grounds for a mistrial and allowed counsel to lead and impeach Ramos in order to bring him back to the truth (Tr. 138-141).

Penal Law in late 1970 that he learned of his duty to register, and he registered soon thereafter. Confronted with the fact that he had not registered until January 7, 1972 Ramos, then claimed that he had not registered before that because he was studying (Tr. 145-146).

Although Ramos claimed he had received a letter in 1972 from Commissioner Malcolm * which indicated he was eligible for consideration and that he would eventually be appointed, he did not remember having received the rejection letter (Tr. 131, 147-148). He denied receiving a notice to report for armed forces physical examination and claimed that after reading a draft booklet he went to the draft board to find out about taking the physical examination (Tr. 149). Ramos claimed that after being told by the F.B.I. to report for an Armed Forces physical he went to the induction center but was told to return to the draft board (Tr. 151-152). Ramos could not recall whether he told Special Agent Bartles he had not gone to the induction station because he wasn't feeling well but did recollect telling him that he had read in the newspaper that they were not inducting people anymore (Tr. 158-159).

On cross-examination Ramos claimed he had been to the induction center (Tr. 162-163). He claimed that his mailbox was broken into twice, though he could not remember when, and claimed that because the Stuyvesant Post Office had been reorganized many of the letters addressed to him were lost (Tr. 164, 168, 170). Ramos denied he received any notes from Special Agent Bartles in September, October or November of 1972 (Tr. 166). He denied saying he was employed at B & B Cab Company to anyone at the draft board because he was employed by the Columbia Operating Company when he registered and thereafter (Tr. 167-168).

* Malcolm was the Commissioner of Corrections; Ramos fluctuated between having been a police cadet and a Correction Department trainee.

ARGUMENT

POINT I

The trial court properly dealt with the issue of insanity.

Ramos asserts that the trial court should have ordered a further hearing to determine his sanity at the time of the commission of the crimes charged. The record contains no evidence that Ramos was not completely sane at the time of the crimes charged, or at any other time, and the trial court correctly found Ramos guilty of the offenses charged.

On March 23, 1973, on an application by defense counsel * consented to by the Government, Judge Frankel ordered a psychiatric examination of Ramos to determine his competence to stand trial. This examination was conducted by Dr. George Hamilton Wilkie, and on June 25, 1973 a report was rendered to the Court and all parties mentioned no evidence of present mental instability, Dr. Wilkie found no evidence of existing mental disability and concluded that Ramos was competent to stand trial; he also found no evidence that, at the time of the offenses charged, Ramos was unable to tell right from wrong or to confirm his behavior to acceptable standards.

Faced with this report and his client's insistent refusal to raise an insanity defense, defense counsel presented defenses of lack of intent to violate the law, ignorance, and non-receipt of the induction and preinduction orders (Tr. 7-8, 103, 136-138; Minutes of December 17, 1973, page 2).

* The basis for the application was that at two interviews with the defendant, defense counsel received responses which ". . . were what I would consider inappropriate. Mr. Ramos did not appear to appreciate the consequences of the charge, and I felt he was not aiding in his own defense."

After both sides had rested the Court again expressed its concern about Ramos' mental state (Tr. 175-7).* The trial was adjourned to December 17, 1973, at which time Judge Frankel decided to order an additional psychiatric examination of Ramos to determine his competency to stand trial.** By order dated December 19, 1973, Dr. Gurston Goldin was appointed to examine Ramos. Dr. Goldin submitted a report to all parties finding Ramos mentally competent to stand trial.

The defense of insanity cannot be raised until there is evidence in the record which rebuts the presumption of sanity. *Davis v. United States*, 160 U.S. 469 (1895). *United States v. Currier*, 405 F.2d 1039, 1042 (2d Cir.), cert. denied, 395 U.S. 914 (1969). Here there was no evidence which suggested insanity, for Ramos had been found competent by two psychiatrists, one of whom, Dr. Wilkie, also considered whether Ramos had been insane at the time of the crimes charged and found no evidence that he was. The most that can be said of Ramos' conduct at trial was that his testimony showed a willingness to trifle with the truth which was somewhat more incautious and blatant than the usual, hardly sufficient grounds for an insanity defense. *United States v. Currier, supra*. Given the absence of any evidence of insanity, the reports by two psychiatrists that Ramos was

* The Court suggested that Ramos upon the consent of the Government might be allowed to attempt an enlistment, followed by the filing of a *nolle* regardless of the results, as a possible alternative to conviction. For reasons not here relevant the Government was compelled to reject this course of action (Tr. 171-175; Minutes of December 17, 1973, P. 2).

** The trial judge had initially thought of framing the order in terms of sanity at the time of the offenses charged (Tr. 177-178), later deciding that the examination should go to competence to stand trial since Ramos was raising no insanity defense. What was troubling the Court was quite clearly Ramos' readiness to tell easily proved lies from the witness stand.

sane, and Ramos' insistence that no insanity defense be raised, it was hardly open to defense counsel to raise that defense. There was similarly no basis for Judge Frankel to inject the issue into the case against Ramos' wishes and on such an insubstantial basis. See, e.g., *Whalen v. United States*, 346 F.2d 812, 818 (D.C. Cir. *en banc*), *cert. denied*, 382 U.S. 862 (1965); *Trest v. United States*, 350 F.2d 794 (D.C. Cir. 1965); *Cross v. United States*, 389 F.2d 957, 960 (D.C. Cir. 1968); *United States v. Bradley*, 463 F.2d 808 (D.C. Cir. 1972); *United States v. Simms*, 463 F.2d 1273 (D.C. Cir. 1972).

POINT II

Ramos' failure to tell the truth did not deny him effective assistance of counsel.

Ramos claims in the alternative that if he was not incompetent he was nevertheless denied effective assistance of counsel. This contention appears to be based solely on trial defense counsel's attempts to get his client to testify truthfully on the witness stand.

Ramos testified at his own insistence (Tr. 136). During the direct examination it became increasingly apparent to trial defense counsel that Ramos was not speaking the truth. Faced with what he characterized as an "ethical bind" he asked for a conference with Judge Frankel to discuss the problem he was having getting Ramos to tell the truth (Tr. 135-136).* A motion for a mistrial on this ground was denied by Judge Frankel, who observed that a defendant

* Ramos had testified that he was in a Police Department program, but defense counsel's investigation had disclosed no record of his having been in the program.

should not be allowed to explode his trial simply by telling a blatant lie (Tr. 139).*

Judge Frankel then suggested that defense counsel "lead your client back to what you believe is the truth by confronting him with the information you got from Police Academy records. . . ." (Tr. 140).

Trial defense counsel then attempted to lead Ramos, confronted him with facts contradicting his testimony. To prove that he had been in the training program, Ramos produced a card which indicated a "Jay Ramos" was in the program until December 31, 1970, claiming, however, that he had been in the program through mid-1971 (Tr. 143-144). He further testified he learned about the draft while studying the New York Penal Law in the program and he registered as soon as possible thereafter. In an attempt to save him embarrassment on cross-examination, defense counsel showed Ramos his Selective Service registration, which indicated he did not register until 1972, and tried to plug the gap between 1971 and 1972 (Tr. 145-147). In an attempt to defuse the damaging effects of an obvious lie for cross-examination on his alleged correction officer status, trial defense counsel confronted Ramos with his 1971 rejection letter from the Department of Correction, but Ramos denied any recollection of having received the rejection letter and insisted that he had received a letter in 1972 from Commissioner Malcolm stating that he was eligible for Correction Department employment (Tr. 147-148). He suggested that the reason he did not receive the rejection letter was that the Stuyvesant Post Office had been reorganized, and many letters had been lost (Tr. 148). Defense counsel then continued Ramos' version of the facts, con-

* Somewhat prophetically Judge Frankel during the course of this conference stated: ". . . I would not consider on the basis of the evidence I have heard thus far and on the evidence of the general appearance of the man, that it would be the first and last time he had been neglectful of the truth" (Tr. 139).

fronting him gently with some of the testimony by the Government's witnesses and securing Ramos' explanations of the discrepancies. At the end of Ramos' testimony defense counsel elicited from Ramos that he had advised Ramos prior to trial that he had no defense and should enter a guilty plea, following which counsel moved for a further mental examination of Ramos, which Judge Frankel denied (Tr. 149-155).

Ramos' claim on appeal that he was denied the effective assistance of counsel cannot prevail. Much of the questioning of which Ramos now complains occurred through the use of a normal trial technique by Ramos' trial counsel to blunt cross-examination by eliciting on direct examination explanations of evidence which impeached Ramos' testimony. See, e.g., *United States v. Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). As it was, the prosecution was to severely tax Ramos' credibility on such matters as reporting to the Induction Center (Tr. 162-163); receipt of the July 5, 1973 continuing duty letter to report for induction (Tr. 163-164); the number of times the mail box had been broken into and to whom he reported these alleged break-ins (Tr. 164-165); and the substance of his interview with Special Agent Bartles (Tr. 165-166).* Defense counsel was also trying to limit to the extent possible perjurious testimony by Ramos, a duty he owed not only to Ramos but also to the Court. See American Bar Association Standards Relating to the Prosecution Function and the Defense Function § 7.5(a). (Approved Draft 1971). While, to be sure, defense counsel did not deal with Ramos' perjury the way the *Standards* suggest, *id.* at § 7.7(c), his bringing Ramos' false testimony to Judge Frankel's attention hardly disclosed to Judge Frankel something the Judge had not already divined for himself (Tr. 139). Finally, while the questions trial

* Incredibly, Ramos also denied telling his draft board in July, 1972, that he was employed at the B & B Cab Company, claiming that he was employed by the Columbia Operating Company at that time (Tr. 167).

defense counsel put to Ramos about their pretrial discussions were somewhat doubtful, their purpose was clearly an attempt to develop the only defense trial counsel could hope to succeed with, an insanity defense.

Even if defense counsel's efforts were at times irregular and not overly helpful, it is clear that Ramos is not entitled to have his conviction reversed for two reasons.

First, Ramos has offered no suggestion on appeal as to what any attorney could have done to mount a better defense in the face of the overwhelming case the Government had, and it can hardly be said that, in the context of this case, the actions of his counsel which Ramos now attacks prevented Ramos from asserting any colorable defense. *United States ex rel. Testamark v. Vincent*, Dkt. No. 73-2614 (2d Cir., May 8, 1974), slip op. at 3356-3658. Indeed, as in *Testamark*, slip op. at 3357, "there . . . [was] not too much the best defense attorney . . . [could have done]." Nothing that occurred at Ramos' trial would remotely warrant a reversal for inadequate assistance of counsel under the standards applicable to such a claim in this Circuit. See *United States v. Sanchez*, 483 F.2d 1052, 1055-59 (2d Cir. 1973); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311 (2d Cir. 1974); *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 237 (2d Cir.), cert. denied, 404 U.S. 967 (1971).

Second, none of the impeaching questions asked of Ramos by his counsel on direct examination would have been overlooked by the Government on cross-examination with the exception of those relating to the pretrial discussions between Ramos and his counsel, which were clearly not a proper subject for inquiry by the Government. It is clear from Judge Frankel's findings when he rendered the guilty verdict that the contents of the pretrial discussions between Ramos and his lawyer played no part in his decision.

(Minutes of January 16, 1974, pp. 1-4). Indeed, after the questions about the pretrial discussions were asked and answered Judge Frankel directed that they be stricken from the record (Tr. 155-156). Since this was a bench trial, there is no reason for this Court to conclude that Ramos was in any way prejudiced by any improper questions from his lawyer, *United States v. Cobb*, 396 F.2d 158 (2d Cir. 1968), *vacated on other grounds*, 402 U.S. 937 (1971); *United States v. Reeves*, 348 F.2d 469 (2d Cir. 1965), *cert. denied*, 383 U.S. 929 (1966), particularly since Ramos' guilt was in any event so clear. *Tate v. United States*, 297 F.2d 120, 121-122 (5th Cir. 1961).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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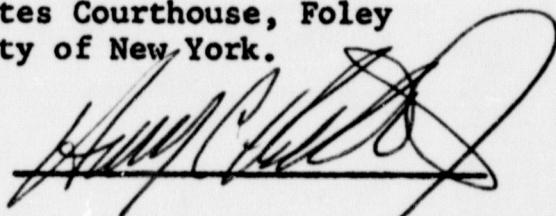
State of New York)
County of New York)

Harry C. Batcher, Jr. being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 12 day of JUNE, 1974
he served a copy of the within Appellees BRIEF
by placing the same in a properly postpaid franked
envelope addressed:

CLARK + HARLEY
89-31 161ST STREET
JAMAICA, NEW YORK 11432

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.



Sworn to before me this

16th day of June, 1974



GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975